BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD LYNCH	)	
Claimant	)	
VS.	)	
	)	Docket No. 258,252
MAGTEK	)	
Respondent	)	
AND	)	
	)	
CGU HAWKEYE-SECURITY INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent Stellux, d/b/a Magtek, Inc., (hereinafter "Stellux"), and its insurance carrier, CGU Hawkeye-Security Insurance Company, appeal the November 13, 2000, Preliminary Decision of Administrative Law Judge Robert H. Foerschler. Respondent and its insurance carrier were ordered to secure an examination of claimant by a competent orthopedic surgeon of their choice with follow-up treatment, if necessary.

ISSUES

Respondent Stellux appeals this order, contending that claimant's alleged accidental injury did not arise out of and in the course of his employment with Stellux, but instead is a new and separate injury which occurred while claimant was working for Magtek, Inc., a new and separate corporate entity. Claimant contends the Board does not have jurisdiction over this dispute, arguing this is merely a fight between two insurance companies which the Board, on many occasions in the past, has held as nonjurisdictional under K.S.A. 1999 Supp. 44-534a and K.S.A. 1998 Supp. 44-551.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

It is undisputed that claimant suffered accidental injury on January 8, 1999, while attempting to free a forklift stuck in a parking lot. Claimant, at that time, experienced pain

in his low back while attempting to move the forklift. Claimant was provided treatment with Dr. Peter J. Young of the Westwood Chiropractic Center. Dr. Young treated claimant from January through May 1999, during which time claimant continued working his regular job with Stellux. Also during this time, Stellux was sold to a new owner, who renamed the company Magtek, Inc.

While being treated by Dr. Young, claimant was advised that he would simply have to live with the pain as there would be little or no improvement without surgical intervention.

Claimant next sought treatment in April of 2000, when his back pain developed to the point where he could no longer adequately perform his job and needed additional medical care. Claimant testified the pain was in the same place in his back. Claimant also testified that his back condition had improved somewhat while being treated by Dr. Young but, after the treatment concluded, his back pain increased.

Claimant was referred to orthopedic surgeon Truett L. Swaim, M.D., for an examination on August 15, 2000. Dr. Swaim examined claimant, reviewed his medical history and concluded claimant needed an additional evaluation by a back specialist, specifically a neurosurgeon or orthopedic surgeon who specializes in back surgery. He also recommended an MRI scan of the lumbar spine with possible epidural injections and physical therapy. Dr. Swaim concluded claimant may ultimately be a surgical candidate. In his opinion, Dr. Swaim felt that the recommended treatment was related to his occupational injury of January 8, 1999.

Claimant is the only person to testify in this matter. He described his symptoms as being bad on the date of accident with some improvement as a result of the treatment by Dr. Young. He stated, however, that, as of April 2000, his pain had returned to the same level as that on the date of accident. Claimant could describe no additional injury which led to his increased need for medical treatment, simply that the condition slowly grew worse over time. He had been advised by Dr. Young that his condition would improve if he performed certain exercises prescribed by the chiropractor. However, claimant noted that the problems, which he described as continuous, did not get better as Dr. Young had hoped.

CONCLUSIONS OF LAW

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g); *see also* Chandler v. Central Oil Corp., Inc., 253 Kan. 50, 853 P.2d 649 (1993).

The Board must first decide whether it has jurisdiction under K.S.A. 1999 Supp. 44-534a and K.S.A. 1998 Supp. 44-551 to consider this matter. Claimant argues that the

sale of the corporation does not, in any way, modify respondent's identity and, therefore, this dispute is merely between two insurance companies, which would be nonjurisdictional.

However, the liability of a corporation is not, in any way, lessened or impaired by a transfer or sale of the assets, properties or other rights of that corporation. *See* K.S.A. 17-7103.

While claimant argues that this is merely a dispute between two insurance companies, it is significantly more. Here, a corporate entity, namely Stellux, was sold during the time claimant was being treated for his January 1999 injury. The company was then renamed Magtek, Inc., by the new owner. When a dispute exists between two respondents rather than two insurance companies, then the question becomes whether claimant suffered accidental injury arising out of and in the course of his or her employment with one or both of those employers. Johnston v. Bradley Krasne, D.D.S., and Applebee's, WCAB Docket No. 236,156 & 251,860 (May 2000). Here, the liability of the separate corporations is substantially more complicated than the nonjurisdictional argument presented by claimant. Corporate entities are separate and distinct, as are their liabilities. Therefore, this is a fight between two respondents, rather than merely an insurance company dispute. The Appeals Board, therefore, finds the issue is whether claimant suffered accidental injury arising out of and in the course of his employment and, if so, with which corporate entity.

The testimony of claimant is uncontradicted in that he suffered accidental injury in January of 1999 while working for Stellux. That condition never completely resolved, even though claimant terminated his ongoing treatment with his chiropractor, Dr. Young. Claimant testified that his symptoms improved or worsened depending upon his physical activities. His symptoms were worse while he was working, but they improved while off work. He also testified that the treatment provided by Dr. Young did provide some improvement, although no complete resolution ever occurred.

Claimant provides no testimony regarding any additional or separate injuries which may have occurred after the January 1999 incident. A claim against respondent is not compensable where the worsening or new injury would have occurred even absent the primary injury or where it is shown that the injury was produced by an independent intervening cause. Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997).

However, when the primary injury under the Workers Compensation Act arises out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury. Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

The Appeals Board finds claimant's injury in this instance is a direct and natural result of the January 1999 accident. This decision is supported by the opinion of

Dr. Swaim and by the testimony of claimant at the preliminary hearing. Therefore, the decision by the Administrative Law Judge ordering respondent and the original insurance carrier, Commercial Union, to secure an examination of the claimant by a competent orthopedic surgeon is affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated November 13, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 2001.

BOARD MEMBER

c: Michael W. Downing, Kansas City, MO
Michael H. Stang, Overland Park, KS
John D. Jurcyk, Lenexa, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director